

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16–CRB–0001–SR/PSSR (2018–
2022) (Remand)


DECLARATION OF MARGARET L. WHEELER-FROTHINGHAM

1. I am an attorney at Mayer Brown LLP, and am counsel for Music Choice in the above-captioned remand proceeding. I submit this declaration in support of Music Choice’s Opposition to SoundExchanges Motion for Issuance of a Subpoena. I am fully familiar with the facts set forth in this declaration, and if called upon to testify could do so truthfully and competently.

2. By email dated April 28, 2021, upon learning that SoundExchange intended to present testimony of SoundExchange’s own outside accountant specifically related to his firm’s 2017 investigation of the BDO defensive audits, Music Choice sought to meet and confer with SoundExchange regarding SoundExchange’s failure to produce documents related to that same audit investigation and responsive to Music Choice’s discovery requests. By email response dated April 29, 2021, Sound Exchange stated that it did not intend to produce additional documents, and took the position that certain withheld responsive documents were privileged. Annexed as Exhibit A to this Declaration is a true and correct copy of email meet and confer correspondence with counsel for SoundExchange.

3. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: May 7, 2021
New York, New York



Margaret Wheeler-Frothingham (NY Bar No. 5281191)
MAYER BROWN LLP
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New York, NY 10020-1001
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Counsel for Music Choice

EXHIBIT A

Wheeler-Frothingham, Margaret

From: Cherry, Andrew B. <ACherry@jenner.com>
Sent: Thursday, April 29, 2021 6:26 PM
To: Wheeler-Frothingham, Margaret; Chapuis, Emily L.; Englund, Steve; Hellman, Matthew S.
Cc: Fakler, Paul
Subject: RE: SDARS III Remand - Discovery Regarding Prager Metis [MB-AME.FID3380375]

****EXTERNAL SENDER****

Hi Margaret,

SoundExchange does not intend to produce additional documents. Subject to our objections, SoundExchange produced all non-privileged documents responsive to your requests in advance of the deadline for document discovery. Among these documents were emails on which Mr. Stark was copied. Some of these emails dated from SoundExchange's 2013-2016 audit of Music Choice, and discussed Mr. Stark and his team's planned review of BDO's audit reports, work papers, and potential for discussions with BDO personnel.

Your suggestion that the pending motion for a subpoena creates a valid reason to reopen document discovery is without merit. It should come as no surprise that SoundExchange intends to discuss Music Choice's Defensive Audits on remand. Not only did the D.C. Circuit identify the effects of relying on such audits as one of the two remaining issues in this proceeding, but SoundExchange also disclosed Mr. Stark as a potential declarant on audit issues on March 31.

As you know, in response to RFP 12, we produced audit-related documents that concerned the "harm or burden SoundExchange contends it has suffered as a result of any PSS licensee's use of the Defensive Audit Provision at any time." Neither at that time, nor in any of our meet and confers regarding document discovery did Music Choice seek any information about or specific discussion of RFP 12. Without taking any position on whether "any documents containing any analysis by Mr. Stark, or anyone else at Prager Metis, of Music Choice's defensive audits" falls within Music Choice's RFP 12, in the spirit of cooperation, we can inform you that the few additional Prager Metis documents are privileged.

Please let me know if you would like to discuss further.

Thank you,
Andrew

From: Wheeler-Frothingham, Margaret <MWheelerFrothingham@mayerbrown.com>
Sent: Wednesday, April 28, 2021 2:28 PM
To: Cherry, Andrew B. <ACherry@jenner.com>; Chapuis, Emily L. <EChapuis@jenner.com>; Englund, Steve <SEnglund@jenner.com>; Hellman, Matthew S. <MHellman@jenner.com>
Cc: Fakler, Paul <PFakler@mayerbrown.com>
Subject: SDARS III Remand - Discovery Regarding Prager Metis [MB-AME.FID3380375]

External Email – Exercise Caution

Counsel,

We write regarding discovery in this remand proceeding. We became aware of SoundExchange's intent to subpoena Prager Metis yesterday afternoon upon receipt of the filing notification of the April 27, 2021 motion to the CRB seeking the issuance of that subpoena. In light of SoundExchange's representations regarding the intended scope of Mr. Stark's testimony, we are writing to ask that SoundExchange promptly produce any documents containing any analysis by Mr. Stark, or anyone else at Prager Metis, of Music Choice's defensive audits. As discussed in SoundExchange's motion, Music

Choice and BDO allowed Mr. Stark to conduct an evaluation of BDO's processes in connection with the defensive audits back at a time when that audit period was still open. It seems unlikely that Prager Metis never provided SoundExchange with any reporting or other analysis of BDO's audits, but we do not see any documents of this type in SoundExchange's production. Although Music Choice does not believe the underlying payments during that stale audit period are relevant in this proceeding, SoundExchange specifically seeks to put the more narrow issue of Mr. Stark's opinion of the sufficiency of the BDO audits at issue in the proceeding. We believe any such documents fall squarely within the scope of Music Choice's 12th RFP to SoundExchange. Please advise, today, if SoundExchange will be producing such documents and, if not, on what grounds it seeks to withhold them.

Margaret L. Wheeler-Frothingham

Associate

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Proof of Delivery

I hereby certify that on Friday, May 07, 2021, I provided a true and correct copy of the DECLARATION OF MARGARET L. WHEELER-FROTHINGHAM to the following:

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at
george@georgejohnson.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

SoundExchange, Inc., represented by Steven R. Englund, served via ESERVICE at
senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund,
served via ESERVICE at senglund@jenner.com

Signed: /s/ Paul Fakler